INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 5

HENRY L. HESS, JR., ADMINISTRATOR OF THE ESTATE OF GEORGE WILLIAM GRAHAM, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 47–48) is reported at 1958 A.M.C. 660. Its findings of fact and conclusions of law (R. 48–62) are not reported. The opinion of the court of appeals (R. 241–255) is reported at 259 F. 2d 285.

JURISDICTION

The judgment of the court of appeals (R. 257) was entered on August 20, 1958. The petition for a writ of certiorari was filed on October 13, 1958, and granted on March 2, 1959. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Oregon Employers' Liability Law could be applied in an action on a maritime tort between private parties.

2. Whether the Government's liability under the Federal Tort Claims Act for an injury on Oregon navigable waters allegedly caused by the operation of a Government dam is governed by the general maritime law, as would be an action between private parties brought either in an Oregon state court or in a federal court.

3. Whether the Oregon Employers' Liability Law is by its terms inapplicable to the facts of this case.

STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act and the Oregon Employers' Liability Law are set forth in the Appendix, *infra*, pp. 49–53.

STATEMENT

This Federal Tort Claims Act suit arose out of the death of George William Graham, a carpenter-foreman who drowned in the Columbia River while engaged in the performance of a contract entered into between his employer and the United States.

1. *The undisputed facts.*[1] The Columbia River, which has its source in the Canadian Rocky Mountains, flows southerly across the State of Washington, and then turns west to form the boundary between Washington and Oregon. In 1933, under the pro-

[1] None of the basic facts, as found by the district court, are challenged by the petitioner. Most of them were stipulated (R. 34–46).

visions of the National Industrial Recovery Act, 48 Stat. 195, government owned and controlled improvements were undertaken at Bonneville, 42 miles east of Portland and 146 miles above the mouth of the river. While these improvements, which were formally authorized in 1935[2] were under construction, Congress, on August 20, 1937, directed that (50 Stat. 731, 16 U.S.C. 832):

> For the purpose of improving navigation on the Columbia River, and for other purposes incidental thereto, the dams, locks, power plant, and appurtenant works now under construction on August 20, 1937, as Bonneville, Oregon and North Bonneville, Washington (hereinafter called Bonneville project), shall be completed, maintained and operated under the direction of the Secretary of War and the supervision of the Chief of Engineers, * * *.

At Bonneville, the Columbia River is divided into two channels by Bradford Island (R. 50). The powerhouse and navigation lock are situated (R. 50) from the island south to the Oregon shoreline. From the island north to the Washington shoreline is a spillway dam—one of whose principal functions, according to the Corps of Engineers, is to maintain the desired water level in the upper pool above Bonneville in order to assure navigational depths from Bonneville to the Celilo Canal (R. 50).[3] The dam

---

[2] Act of August 30, 1935, 49 Stat. 1028, 1038.

[3] *Bonneville Dam*, pamphlet prepared by the Corps of Engineers, Portland District.

Control of the level of the upper pool is also necessary in order to provide sufficient difference in elevation between the

contains 18 bays, numbered consecutively from the fishway bay on the Washington shore (Bay 1) to the fishway bay at Bradford Island (Bay 18) (R. 50). Each bay has a movable gate which opens and closes in a vertical direction (R. 50). When closed, the gates rest on the top of the so-called "ogee" section (*i.e.*, the upper line of the submerged stationary portion of the dam) (R. 50).

Downstream, on the bed of the river, is a concrete structure known as the "baffle deck" because concrete blocks, or "baffles," are built into it (R. 50). The purpose of the baffles is to dissipate the energy of the water discharged through the dam and thereby reduce its downstream velocity (R. 50–51).

During the period of years after the completion of the dam in 1938, the baffle deck and baffles had become eroded by the flow of water (R. 51). Consequently, on June 23, 1954, the Corps of Engineers entered into a contract with Robert C. Larson, doing business as the Larson Construction Company, for the restoration of the south half of the eroded baffle deck (R. 51). The contract contemplated that Larson would construct a cofferdam which would seal off particular areas, thereby permitting the water to be drained off and the deck to be exposed (R. 51). This construction was to be undertaken by Larson without interruption of the normal power generation of the powerhouse (R. 51). The contract further contemplated that the construction work would be commenced while water was being necessarily dis-

---

upstream pool and downstream "tailwater" needed to operate the powerhouse turbines. *Ibid.*

charged through the spillway dam, until such time as the flow of the river had receded to a point where it could be handled entirely through the powerhouse (R. 51). Larson was to inform the Government of all proposed action on his part which would have an effect upon the operation of the spillway dam (R. 51).

On July 14, 1954, the Corps of Engineers gave notice to Larson to proceed with the performance of the contract, and the latter thereupon started the preliminary marshaling of necessary equipment and construction materials (which he was contractually obligated to furnish, along with all necessary labor) (R. 52). On August 13, 1954, Larson was notified that, in accordance with the provisions of the contract, the construction work on the cofferdam was to be started within ten days (R. 52). On the same day, Larson conferred with Alfred M. Capps, the project superintendent in charge of the operation of the Bonneville dam, regarding the possibility of closing a number of the gates of the spillway dam during the preliminary construction work on the cofferdam (R. 52). As a result of this conference, the gates in Bays 11 through 17 were immediately closed (R. 52).

Between August 16 and August 20, 1954, the Government construction project engineer, Patrick S. Leonti, conferred with Larson and his acting superintendent, Harry Claterbos, with respect to their plans for carrying out the contract (R. 53). As project engineer, Leonti's duties included inspection of the project during the construction to ascertain that Larson was meeting the contract specifications, and serving as liaison between Larson and the Government

employees responsible for the operation of the dam (R. 53). Leonti informed Larson that any requests to close additional gates of the spillway dam should be directed to him, and that he would then relay those requests to the appropriate operational personnel (R. 53).

According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib in Bay 9, which was to rest on the ogee curve and to run from the top of that curve at right angles to the face of the dam (R. 53). Because the contract drawing reflected the cross-section of the ogee as originally constructed, and because he thought it might subsequently have become eroded to some extent, Larson determined that it was necessary to take soundings to establish its true cross-section at the time (R. 53–54). The contract itself neither required nor referred to the taking of such soundings (R. 54).

On August 18, Larson advised Leonti of his intention to take the soundings on August 20 (R. 54). Leonti was further advised that Larson proposed to accomplish this objective by pushing a barge into Bay 9, off the side of which the soundings would be taken (R. 54). Larson requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 p.m. on August 20 in order to facilitate the operation (R. 54). At no time did Larson, or his representatives, request that any of the other open gates be closed (R. 54).

Leonti forwarded the request to the operations division of the dam, and it was fulfilled (R. 54). On August 19, Larson's superintendent, Claterbos, undertook a reconnaissance trip of the area in a tugboat for

the purpose of ascertaining whether the proposed manner of taking the soundings was safe (R. 54–55). On the basis of this reconnaissance trip, and his own personal observation of the situation, Larson determined for himself that it was safe (R. 55). The advice of the Government on the matter was not sought (R. 55).

Shortly before 2:00 p.m. on August 20, Larson's tug MULEDUZER set out from the Bradford Island shore of the river, pushing Larson's barge FOREST No. 12 (R. 55). The barge was made fast to the tug by four steel lines (R. 56). Two of these lines ran from the stern mooring bits of the barge to the forward winches of the tug (R. 56). The other lines ran from the stern mooring bits of the barge to the stern winches of the tug (R. 56).

On board the tug or barge were six Larson employees: two crew members (Magnor Larson and Coles) and four members of the sounding party (Graham, Boylan, Tobias and Lewis) (R. 55). Tobias, a civil engineer, was in charge of the operation and none of the others in the sounding party had any control over the manner in which it was to be conducted (R. 55). All of the personnel involved, as well as all of the equipment utilized, had been selected by Larson alone (R. 55).

The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and then proceeded upstream toward Bay 9 (R. 56). As the barge reached that Bay, it veered in a northerly direction and its port bow struck a pier located between Bays 8 and 9 (R. 56). As a result, the bow

was stove in and, as water came in through the hole, the barge moved in front of Bay 8 and the other open bays to the north (R. 56). Both the barge and tug swamped and sank; the former being broken to pieces (R. 56). All those aboard were thrown in the water and, with the exception of Coles, were killed.

2. *Proceedings below.* On April 18, 1955, this suit was brought under the Federal Tort Claims Act to recover damages for Graham's death (R. 1–10). On December 3, 1956, a pretrial order was entered, which raised the issue as to whether appellant's remedy was under the Oregon Wrongful Death Act, Ore. Rev. Stat. 30.020, or the Oregon Employers' Liability Law, Ore. Rev. Stat. 654.325 (R. 19–33). Petitioner contended that he was entitled to rely on the Employers' Liability Law, *infra,* pp. 49–53, notwithstanding the fact that the death of his decedent had occurred on navigable waters (R. 30). The Government's position was that actions for damages for death of a workman on navigable waters within the territorial limits of the State of Oregon are governed by general maritime laws; and that, as a consequence, only the Wrongful Death Act could be applied (R. 30–31).[4]

On March 29, 1957, the district court filed an opinion in which it ruled that the Employer's Liability Law was inapplicable for two separate and distinct reasons: (1) the Government was not responsible for the work being performed by Larson; and (2) the law could not be constitutionally applied to this case

[4] The pretrial order reserved the question as to whether the Employers' Liability Law was inapplicable for some other reason (R. 31–32).

(R. 47–48). The court further determined that petitioner had failed to prove that the Government was negligent in any respect and that, therefore, he was not entitled to recover under the Oregon Wrongful Death Act (R. 48).

On May 9, 1957, the district court filed its findings of fact and conclusions of law (R. 48–62). In addition to the above-mentioned facts, the court found (R. 56–59) that (1) the proximate cause of the accident had been the turbulent condition of the water in the spillway basin; (2) this condition had been open, apparent and obvious to Larson, the tugboat operator and his other employees; (3) the difference in elevation of the water in the turbulent area opposite the open gates in the spillway basin, as compared with the area opposite the closed gates, also had been visible and obvious; (4) Larson had been an independent contractor and had not operated under the supervision, control and direction of the United States; (5) the Government had had no control over the details, manner or method by which the work under the contract was to be accomplished, but had been interested only in insuring a general result in conformity with the contractual specifications and had retained a mere right to inspect the work during its progress in order to determine whether this result was being obtained; (6) Larson had determined for himself the method, manner and means by which the sounding operation would be carried out, and no employee of the United States participated in the operation or gave Larson or any of his employees directions or orders with respect thereto; (7) no employees of

> States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States and of each other with foreign states.

It was from that principle of uniformity that the classic formulation in *Jensen* of the dividing line between state and federal authority was drawn: that no state law may be applied which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations" (244 U.S. at 216).

Obviously, such statements of general principles are not self-executing and the allocation of state and federal authority as to any particular aspect of maritime transactions can be finally established only by the process of adjudication. By that process, however, the Court has, as we shall attempt to show, made clear that the principle of uniformity requires that the substantive rules governing tort liability for injuries occurring on navigable waters not be varied by state laws.

B. THE SUBSTANTIVE STANDARDS OF TORT LIABILITY FOR INJURIES OCCURRING ON NAVIGABLE WATERS ARE EXCLUSIVELY FEDERAL AND MAY NOT BE DISPLACED BY STATE LAW

As to each incident of the law governing maritime transactions, different considerations bearing on the proper scope of federal and state law may come into play, and that is true even within the area of rights and liabilities arising out of personal injuries. Thus,

distinctions must be made, as we shall show, between tort liability and workmen's compensation and, even within the area of tort liability, between the substantive standards of liability and the availability of "remedies" to enforce those standards. The particular aspect with which we are concerned is the choice of the substantive standards of tort liability to be applied to maritime torts: *i.e.*, the basic rules governing conduct causing injuries on navigable waters. However uncertain may be the division of state and federal authority on other matters, in this area the Court has given full expression to the basic principle of uniformity and has rejected every attempt to apply state rules to the determination of substantive tort liability for injuries on navigable waters.

1. The controlling force of federal law in defining maritime tort liability was foreshadowed even before *Jensen*. Thus, for example, in *Workman* v. *New York City*, 179 U.S. 552, the Court sustained a judgment against the City for damages caused by the collision of a City fireboat with the libellant's ship, rejecting the City's defense that under state law it was not liable for harm inflicted in the performance of a "governmental" function (p. 558):

> The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there

> would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. * * *

It was in the decisions following *Jensen,* however, that the full scope of the principle was established. In *Chelentis* v. *Luckenbach SS. Co.,* 247 U.S. 372, decided at the next Term, a seaman brought a common-law action (under the saving-to-suitors clause of § 9 of the Judiciary Act of 1789, 1 Stat. 77) for damages for the loss of a leg allegedly because of the negligence of the ship's master. At that time the maritime law allowed no action against the ship owner for the negligence of the master, but limited the seaman's remedies to maintenance and cure (whether or not the injury was caused by negligence). The Court held that an action under the state law of negligence could not be maintained (pp. 382, 384):

> * * * Under the doctrine approved in *Southern Pacific Co.* v. *Jensen,* no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common

> law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."
>
> * * * * * *
>
> * * * Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. * * * [P]etitioner's rights were those recognized by the law of the sea.

See also *Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255, similarly holding that a seaman could not maintain a state court negligence action against a ship owner, although affirming a judgment for the seaman under the maritime law of unseaworthiness.

The decision most closely in point on its facts is *Robins Dry Dock Co.* v. *Dahl,* 266 U.S. 449. There, the plaintiff, while engaged in repair work on a vessel lying in navigable waters, was injured when the scaffolding on which he was standing broke. In a negligence suit against his employer for damages, the jury was charged that it might consider as evidence of negligence the provisions of the New York Labor Law requiring employers to furnish scaffolding which is not "unsafe, unsuitable or improper" and affords

"~~proper~~ protection" to employees. This Court reversed a judgment for the plaintiff, holding that the provisions of the local law were irrelevant and should not have been considered by the jury: "The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute" (p. 457).

Many more recent decisions of this Court attest to the continued exclusiveness of federal law in determining substantive liability for maritime torts. Thus, in *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, the Court held that the federal maritime law, rather than the law of the State in whose courts the suit was brought, governed the burden of proof on the validity of a release given by a seaman and asserted as a defense to his suit for damages under the Jones Act and for maintenance and cure. In *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, an employee of an independent contractor, on board a berthed vessel to repair loading equipment, fell through an uncovered hatch hole. In the employee's action against the ship owner, the jury found the owner negligent but the employee contributorily negligent. This Court sustained an award of damages on the negligence count under the maritime comparative-negligence rule, although contributory negligence would have been a complete bar under the state law, stating (p. 409–410):

> * * * True, *Hawn* was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on

the Government had been engaged in the sounding operation and there had been no intermingling of employees of the United States with the Larson employees in connection with the work being performed at the time of Graham's death; and (8) the Government had not been in charge of, responsible for, or engaged in the work being performed by Larson which resulted in the accident. All of these findings have been accepted by petitioner.

In its conclusions of law, the district court reiterated its previous determination that the Oregon Employers' Liability Law was inapplicable and ruled that, since the United States was neither negligent itself nor chargeable with the negligence of Larsor and his employees, liability under the Oregon Wrongful Death Act and the Federal Tort Claims Act had not been established (R. 60–61).

The court of appeals affirmed (R. 241–255). It held that, since the accident occurred on navigable waters, the applicable law of Oregon—the place where the act or omission occurred—was the general maritime law (R. 247–250). It further held that the Oregon Employers' Liability Law is not "a constitutionally permissible supplementation of the general maritime law" because it imposes a stricter standard of care, and therefore that "it could not constitutionally be applied in this case" (R. 250–252). Finally, the court determined that the findings of the district court relating to the negligence of the Government were supported by the evidence and that, therefore, liability could not be imposed under the Oregon Wrongful Death statute (R. 253–255).

SUMMARY OF ARGUMENT

This is a Federal Tort Claims Act suit arising out of the drowning of the decedent in navigable waters of the United States within the State of Oregon. The only issue here is whether there may be applied to this action the provisions of the Oregon Employers' Liability Law imposing a higher standard of care than that of the general maritime law.

I. The sole test for determining whether an action for tort is within the jurisdiction of admiralty is the locality where the alleged injury took place. In this case the decedent's drowning occurred in navigable waters of the United States and consequently the action is plainly within admiralty jurisdiction.

II. A. The basic governing law as to all matters within the admiralty jurisdiction is the general maritime law—a uniform body of federal law drawing its authority from the grant of admiralty jurisdiction in Article III of the Constitution. The underlying principle of uniformity provides a general guide to the extent to which that law may be supplemented by state law, but it is only through the process of adjudication as to each of the many incidents of maritime relationships that the division between state and federal authority has become concrete.

B. The particular aspect of the law governing maritime transactions with which we are concerned is that prescribing the substantive standards of tort liability. Whatever uncertainties there may be as to the applicability of state law in other areas, in this area the Court has made clear, by a long course of decisions

in which it has rejected every attempt to apply state rules to the determination of substantive tort liability, that the general maritime law is exclusive. Those decisions clearly require rejection of the state law sought to be invoked here.

C. Petitioner is in no way aided by the rules developed to determine the extent to which state workmen's compensation laws may be applied to injuries occurring on navigable water, for the policies governing the division of authority in the two areas of workmen's compensation and tort liability are basically different. That admiralty jurisdiction depends in tort on the locality of the injury but in contract on the nature of the transaction demonstrates that admiralty jurisdiction over various kinds of legal relationships need not be governed by the same incident. Thus, in defining the extent to which state compensation laws could validly be applied, the courts, although adopting in part the "locality of the injury" test controlling tort jurisdiction, modified it to allow state compensation laws to be applied to maritime injuries if the employee's activities were of "mere local concern". But that test has no application to tort cases and it has, we believe, never been so applied.

By the same token, the "twilight zone" concept, developed to overcome the difficulties of application of the "local concern" test in determining whether an employee's rights were governed by the state or federal *compensation* systems, likewise has no application to *tort* liability.

D. That this action is brought under a wrongful death provision of the Oregon Liability Law clearly

makes no difference. While a state wrongful death statute may be applied in admiralty to provide a remedy not accorded by the maritime law, there must first have been a breach of a duty defined by the maritime law and the wrongful death action cannot be used to vary the maritime standards of substantive tort liability.

III. Under the Federal Tort Claims Act the Government's liability in tort is determined in the same manner as that of a private individual under like circumstances according to the law of the place where the act or omission occurred. The place where the alleged act or omission occurred in this case was the State of Oregon, and since, under Oregon law (including maritime law), the Liability Law could not be applied in a suit against a similarly situated private person (as we have shown above), it likewise cannot be invoked against the United States in this action.

IV. Petitioner would not be assisted even if there were no constitutional obstacles to the application of the Oregon Employers' Liability Law. In terms, as well as by reason of the construction given it by the Oregon Supreme Court, that statute cannot serve as a basis for imposing liability in circumstances where, as the district court found to be the situation here, (1) the defendant was not in charge of, responsible for, or even engaged in, the work performed by the decedent at the time of his death; and (2) the independent contractor who employed the decedent, in full charge of the work and the conditions under which it

was being performed, affirmatively determined that those conditions posed no undue risk.

ARGUMENT

Petitioner does not challenge the findings below that the United States was not liable under the reasonable care standards of the general maritime law. His sole claim here is that the cause of action was governed by the Oregon Employers' Liability Law, which provides in part (§ 654.305, *infra*, pp. 49–50):

> Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.[5]

It is the position of the Government that the Liability Law may not be applied to this action because a like action between private parties, being on a maritime tort, would be governed exclusively by the general maritime law, and the United States is liable under the Tort Claims Act only to the same extent as a private person would be in like circumstances. We

[5] The Liability Law also provides a special action for wrongful death by reason of a violation of its provisions (§ 654.325, pp. 51–52, *infra*), and it is under that provision that petitioner, the administrator of the decedent's estate, is suing.

contend finally that the Liability Law is in any event inapplicable by its own terms.

I

PETITIONER'S CLAIM IS GROUNDED UPON AN ALLEGED MARITIME TORT

It has long been established that "every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance" so long as "the substance and consummation of the [wrong and injury complained of] have taken place upon [navigable] waters". *The Plymouth,* 3 Wall. 20, 35, 36. That "admiralty jurisdiction depends * * * in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled". *Grant Smith-Porter Co.* v. *Rohde,* 257 U.S. 469, 476.

The locality of the tort, in turn, is determined not by the place where the force causing the injury was set in motion but by the place where "the causal influence of the negligent management * * * took effect injuriously and gave rise to a cause of action. * * *." *Martin* v. *West,* 222 U.S. 191, 197. Thus "where the tort is committed * * * partly on land and partly on water, the question whether admiralty has jurisdiction over it is determined by the place of the damage, and not by the place of the origin of the tort." *Swayne & Hoyt* v. *Barsch,* 226 Fed. 581, 588 (C.A. 9); see Robinson, *Tort Jurisdiction in American Admiralty,* 84 U. of Pa. L. Rev. 716, 748–754; Stumberg, *Tort Jurisdiction in Ad-*

miralty, 4 Tex. L. Rev. 306, 312–31[4]. For example, where a longshoreman at work on a ship was struck by a swinging cargo hoist and knocked off the ship to the wharf, the right of recovery was held to be governed by maritime law because it was the "blow received on the vessel in navigable water which gave rise to the cause of action," with no inquiry being made whether the hoist was operated from the ship or the wharf. *Minnie* v. *Port Huron Terminal Co.,* 295 U.S. 647, 648.[6] On the other hand, where a longshoreman standing on a wharf was struck and knocked into the water by a loaded sling operated from a vessel, the case was held not to be of admiralty cognizance. *Smith & Son* v. *Taylor,* 276 U.S. 179.[7] In short, therefore, "if the fatal force is applied to the body of the deceased on navigable waters; the admiralty would have jurisdiction although the chain of causation was originated by a negligent act on shore." Magruder and Grant, *Wrongful Death Within Admiralty Jurisdiction,* 35 Yale L. J. 395, 404.[8]

---

[6] Similarly, where a workman upon a lighter moored in navigable waters received an eye injury from dust from a city dump on shore, the case was governed by maritime law. *McDonald* v. *City of New York*, 36 F. 2d 714 (C.A. 2) (per L. Hand, J.).

[7] Since the question whether a tort is maritime is one of general maritime law, the Oregon courts, of necessity, have applied the same distinction. See *Cordrey* v. *Steamship "Bee"*, 102 Ore. 636; *Rorvik* v. *North Pac. Lumber Co.*, 99 Ore. 58.

[8] The converse is also generally true, *i.e.*, that admiralty jurisdiction does not extend to a tort which though initiated on navigable waters takes effect on land. See *The Plymouth*, 3 Wall. 20; *Ex parte Phenix Insurance Co.*, 118 U.S. 610; *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U.S. 388; *Martin* v. *West*, 222 U.S. 191. That limitation has, however, been modi-

In this case, the injurious force (the turbulent waters causing the tug to capsize) came into contact with, and caused the death of, decedent on navigable waters. Under established principles, therefore—which we do not understand petitioner to dispute—this suit, if between private parties, would clearly be within the admiralty jurisdiction, and it would be irrelevant whether the dam itself is deemed a land structure or a maritime aid to navigation.

II

THE OREGON EMPLOYERS' LIABILITY LAW COULD NOT BE APPLIED TO A MARITIME TORT ACTION BETWEEN PRIVATE PARTIES IN LIKE CIRCUMSTANCES

A. INTRODUCTION

The nature and sources of the law governing matters within the admiralty jurisdiction were recently canvassed by this Court in *Romero* v. *International Terminal Co.*, 358 U.S. 354, and need not be repeated here. As both the majority and the dissenting opinions there recognized (pp. 377–378, 391), it has been established at least since *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, if not before, that the basic system of jurisprudence governing maritime matters, whether arising in a state or federal court, is a body of uniform federal law drawing its authority from the constitutional grant of federal judicial power over "all

---

fied by Congress, which in 1948 provided that admiralty jurisdiction should extend to all injuries "caused by a vessel * * * notwithstanding that such damage or injury be done or consummated on land." 62 Stat. 496, 46 U.S.C. 740.

Cases of admiralty and maritime Jurisdiction" (Art. III, § 2, cl. 1).

That is not to say that every aspect of maritime relationships is governed exclusively by federal law. To the contrary, it is equally clear that there are numerous incidents to which state law may validly be applied to supplement the federal law. As the Court noted in *Romero,* state laws governing liens, remedies for wrongful death, survival of actions, partition and sale of ships, specific performance of arbitration agreements, and aspects of maritime insurance have all been enforced in admiralty (358 U.S. at 373). That a subject matter is within the admiralty "jurisdiction" (*e.g.,* maritime torts), therefore, does not necessarily mean that state laws may not be applied to it. There remains the problem, as to each legal relationship, of defining the permissible scope for the operation of state laws.

Certainly, the main guidepost in determining the extent to which state laws may be applied to matters within the admiralty jurisdiction is the basic principle of uniformity found implicit in the constitutional grant of admiralty jurisdiction and which was the very reason for the development of a federal maritime law. As explained in *The Lottawanna,* 21 Wall. 558, 575, the grant of federal admiralty jurisdiction in Article III had reference to:

> a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several

> a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in "its substantive as well as its procedural features . . . ." *Panama R. Co.* v. *Johnson,* 264 U.S. 375, 386. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for * * * negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. * * *

Finally, the Court reaffirmed only last term that federal maritime law, not state law, governs substantive tort liability for injuries upon navigable waters. In *Kermarec* v. *Compagnie Generale,* 358 U.S. 625, the plaintiff was injured, allegedly because of a defective stairway, while aboard a berthed vessel to visit a crew member. The Court held that the plaintiff's action for negligence against the ship owner was to be governed by the maritime standard of reasonable care, rather than by the state law rule that a "gratuitous licensee" is entitled only to be warned of dangerous conditions within the actual knowledge of the defendant, saying (p. 628):

> The District Court was in error in ruling that the governing law in this case was that of the State of New York. Kermarec was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law. * * *[9]

The unanimous decision in *Kermarec,* we believe, accurately sums up the effect of the long series of decisions by this Court rejecting the application of state law to questions of substantive liability for maritime torts. It holds, in effect, that the choice of substantive tort law depends solely on whether or not it is a maritime tort. If the injury occurred on navigable waters and is thus within the admiralty jurisdiction, the inquiry is at an end; federal maritime law is controlling and varying state rules are irrelevant.

2. Ignoring the decisions of this Court dealing specifically with the law governing substantive tort liability, petitioner invokes the vague formulation of *Jensen* and contends that the application of the Oregon Employers' Liability Law to a maritime tort would not materially prejudice the "characteristic features" of the maritime law because the "incidents" of the cause of action thus created are not "hostile" to those features. This Court has not left the matter to an

[9] The Court further held that the maritime rule of comparative negligence, rather than the state rule that contributory negligence was a complete bar, was controlling. *Id.* at 629.

exercise in abstract verbalisms, however, but has made concrete the application of *Jensen* to questions of substantive tort liability by repeatedly holding that it is maritime law, and only maritime law, that may be applied to maritime torts.

Properly viewed, the issue in this case is really one of choosing between maritime law and state law and not, as petitioner phrases it, one of "supplementing" the maritime law. The standard of liability under the maritime law is "reasonable care" [10]; the standard under the Oregon Employers' Liability Law, a "much higher degree of care." *Hoffman* v. *Broadway Hazelwood,* 139 Ore. 519, 524.[11] But since a standard of care prescribes the extent of the defendant's duties as well as that of the plaintiff's rights, it is obvious that both cannot be applied to the same transaction. The higher standard of care of the Oregon law directly conflicts with the maritime standard of reasonable care in precisely the same way as

---

[10] *Kermarec* v. *Compagnie Generale*, 358 U.S. 625, 632; *Leathers* v. *Blessing*, 105 U.S. 626; *The Max Morris*, 137 U.S. 1; *The Admiral Peoples*, 295 U.S. 649; *Jacob* v. *New York City*, 315 U.S. 752.

[11] See, *e.g.*, *Camenzind* v. *Freeland Furniture Co.*, 89 Ore. 158, 172–173:

> In the absence of a statute the master is only required to employ reasonable care in providing a safe place to work and if by due care and reasonable expense the employer can lessen the risk to the employee it is his duty to do so: * * *. The statute, however, has enlarged the duty of the master and instead of being satisfied with the exercise of reasonable care the law now requires the master to use every device, care and precaution which it is practicable to use for the safety of the servant * * *.

See also *Fromme* v. *Lang*, 131 Ore. 501, 504, 505; *Shelton* v. *Paris*, 199 Ore. 365, 368; *Howard* v. *Foster and Kleiser Co.*, 67 Ore. Adv. Sh. 465, 332 P. 2d 621.

did the lower standard of care of the New York law sought to be applied in *Kermarec,* and, as there, the choice must be made whether state *or* federal law shall govern. And if the state standard of care can be applied here, there would be no basis for rejecting a state defense of contributory negligence in like circumstances.

Clearly, two systems of law with differing substantive rules governing the same transaction can co-exist only with some standard by which to choose which of the rules is to be applied to a particular case. Petitioner's suggestion would seem to be that in each case the rule should be applied which is of greatest benefit to the plaintiff. But the uniformity sought to be achieved by the maritime law—the very reason for its creation—was as much (if, indeed, not more) a uniformity of defendants' obligations as a uniformity of plaintiffs' rights. The maritime law, created to avoid the disuniformity of multiple state laws, would thus, under petitioner's view, be used simply to add to the multiple state laws one more system of laws from which plaintiffs might choose.

C. NEITHER THE "LOCAL CONCERN" TEST NOR THE "TWILIGHT ZONE" CONCEPT GOVERNING THE APPLICATION OF STATE WORKMEN'S COMPENSATION LAWS TO MARITIME INJURIES IS APPLICABLE TO THE DETERMINATION OF TORT LIABILITY

1. *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, and *Grant Smith-Porter Co.* v. *Rohde,* 257 U.S. 469, read together, established the rule that state workmen's compensation legislation could not be applied to injuries occurring on navigable waters unless the

activity in which the employee was engaged was of "mere local concern".[12] Petitioner apparently contends that if state compensation laws may be applied to "local" maritime injuries it must follow that state tort law may be applied to the same kind of injuries. Even accepting arguendo petitioner's premise that the repair of the Bonneville dam was a matter of "mere local concern" within the meaning of that test,[13] it is clear, we submit, that that test has no application to questions of tort liability.

Petitioner's mistake is in assuming that the division of state and federal powers must turn on the same "jurisdictional fact" regardless of the nature of the legal relationships sought to be regulated—which is surely not the case. For example, while admiralty

---

[12] As the test was phrased in the cases following *Rohde* and relied on by petitioner (Pet. Br. 28–29).

[13] In fact, however, the decedent's activity in taking soundings for the construction of the cofferdam preparatory to repairing the baffle deck of the spillway dam was "not of mere local concern." As we noted above (*supra*, p. 3), Congress authorized the completion of the Bonneville project for "the purpose of improving navigation on the Columbia River and for other purposes incidental thereto." Moreover, the spillway dam has a principal function of maintaining the water above the dam at navigable depths. Even the baffle deck has a specific maritime purpose: to dissipate the velocity of the downstream flow of water. Consequently, the decedent's work not only was not of "mere local concern," but was directly concerned with aiding navigation on the Columbia River. Cf. *Atkinson* v. *State Tax Commission*, 156 Ore. 461, 463, affirmed, 303 U.S. 20. The petitioner's reliance upon *The Panoil*, 266 U.S. 433, is misplaced. Whether admiralty law would control if the spillway dam were damaged by being struck by a ship is irrelevant. The issue is merely whether the decedent's activity was of more than local concern and, we submit, repair of the Bonneville spillway dam satisfies that test.

jurisdiction in tort matters depends on the locality of the injury, jurisdiction in contract matters depends on the nature of the transaction. *Grant Smith-Porter Co.* v. *Rohde,* 257 U.S. 469, 476. Thus, the rights in tort of a passenger injured on a vessel would be governed by the maritime law, but his rights to recover for the same injury under a general accident insurance policy would be governed by state law.

There is, therefore, no necessary reason for the standards governing the applicability of state compensation law and state tort law to maritime injuries to be the same, and it is sufficient to refer to Mr. Justice Brandeis' analysis of the differences between workmen's compensation and tort liability, and the former's greater analogy to contractual liability, to demonstrate that there are many reasons for them to be different. See *Washington* v. *Dawson & Co.,* 264 U.S. 219, 233–234 (dissenting opinion). Indeed, the surprising thing—and the aspect for which *Jensen* has been most vigorously criticized—is that the place of the injury was made relevant at all (though not controlling, as in tort, since it was modified by the "local concern" exception) to the application of workmen's compensation laws. But whatever the merits of the particular hybrid standard adopted in workmen's compensation cases, that standard never did, and does not now, have any application to the choice of law governing tort liability.[14]

[14] It must be admitted that the Court has not always kept the distinction between compensation cases and tort cases clearly in mind and, on occasion, in rejecting the application of state law to a maritime tort, has observed that the matter "was not of mere local concern," citing the *Rohde* case. *Robins Dry*

2. The "twilight zone" concepts developed in the compensation cases are equally inapplicable to questions of tort liability. A brief summary of the development of those concepts, as explained in *Davis* v. *Department of Labor*, 317 U.S. 249, will make that clear. Because of the limited scope allowed to state compensation statutes under *Jensen* and its progeny, Congress, in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, provided a federal system of compensation for maritime workers to be applicable whenever compensation could not "validly be provided by State law" (33 U.S.C. 903). Since rights under the state and federal acts were thus made mutually exclusive, this still required a determination in every case whether state compensation could "validly be provided" under *Jensen*. Whether an activity was sufficiently "local" in nature to permit application of state compensation laws under the *Rohde* test, however, proved to be a standard incapable of predictable application, with the result that employees frequently found that they had pursued the wrong remedy. As the Court explained in *Davis* (p. 254):

> As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while

---

Dock Co. v. *Dahl*, 266 U.S. 449, 457, discussed *supra*, pp. 22–23. The fact remains, however, that in no case has the Court ever actually applied the "local concern" test to allow state law to be applied to determine liability *in tort* for an injury occurring on navigable waters.

> he was erroneously pursuing it elsewhere. See e.g., *Ayres* v. *Parker*, 15 F. Supp. 447. Such a result defeats the purpose of the federal act, which seeks to give "to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation," and the state Acts such as the one before us, which aims at "sure and certain relief for workmen."

To relieve that uncertainty, and the resulting frustration of the policy of both the federal and state acts to provide a prompt and expeditious remedy to injured workmen, the Court adopted, in effect, a rule that in the "twilight zone"—*i.e.*, where there is substantial doubt whether the activity is sufficiently "local" to permit application of the state law—an award under either state or federal law would be deemed presumptively valid and be upheld.

The reasons why the "twilight zone" does not apply to tort liability are many, but a few may be briefly mentioned: the "local concern" test, the application of which is the very subject matter of the twilight zone, itself has no application to tort liability (as shown *supra*, pp. 27–29); in tort cases, the question of applicable law is raised as one of the choice of law to govern the single proceeding, so that there is no danger of inconsistent determinations; and the tort standard of the place of the injury, unlike the "local concern" standard governing workmen's compensation, is one capable of easy application.

Finally, while it is true that the practical result of *Davis* is to give an employee in the "twilight zone" an "election" to choose either the state or federal com-

pensation remedy, theoretically state and federal powers still remain mutually exclusive, and the election results only as an incidental by-product of the necessity for a "practical solution to a practical problem" (Stewart, J., dissenting in *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272, 274). Petitioner's attempt here to apply "twilight zone" concepts in tort actions, not to solve any practical problems that have arisen, but for the very purpose of giving him a free choice between two systems of substantive law, is thus a complete distortion of the underlying rationale of *Davis*.

3. Petitioner's reliance on *Hahn* v. *Ross Island Sand & Gravel Co., supra,* as establishing that any person within the "twilight zone," as defined for workmen's compensation purposes, may choose either state or federal law to govern a tort action for personal injuries (even, as here, against one not his employer) is untenable.

The Longshoremen's and Harbor Worker's Act makes its provisions for compensation, if applicable, exclusive, and bars the covered employee from bringing an action for damages against his employer. The question in *Hahn* was whether the federal act was applicable so as to bar such a damage action. By its terms, the federal act was not applicable if compensation could "validly be provided" by state law. Since *Hahn* was within the "twilight zone" in which either compensation act could be applied, there was thus raised one of those logical difficulties inherent in the concept of the "twilight zone": which act was to be presumed "applicable" when the employee had in fact proceeded under neither? The Court resolved

the impasse by accepting the presumption contended for by the employee, who as a practical matter normally has the power to "elect" which statute to come under. Since, under that presumption, the matter was within the constitutional power of the state to provide for compensation, the federal act was by its own terms inapplicable. Accordingly, Hahn's damage suit against his employer, which the state compensation act permitted because the employer had elected to reject compensation insurance, was not barred by the federal statute.

That, we believe, is all that was decided in *Hahn*. The only issue was whether the federal compensation act barred Hahn from bringing a damage suit at all, and the issue of what substantive tort law would govern the damage suit if maintainable was neither decided nor adverted to. Indeed, the only intimation in the opinion of the nature of the damage suit is the statement that the state compensation law permitted an employee of a noncomplying employer to "maintain in the courts a negligence action for damages" (p. 273). The statute cited provides that a suit may be brought for injuries caused by "negligence, default or wrongful act". Ore. Rev. Stat. 656.024. Thus, neither the opinion nor the cited statute carries any implication whether the negligence action would be confined by the substantive standards of the maritim law or be governed by some unmentioned state rule.

In fact, it appears from the decision of the Oregon Supreme Court in the *Hahn* case, as petitioner here alleges, that Hahn had sued for damages both under the reasonable care standard (the standard of mari-

time law) and under the stricter standard of care of the Oregon Employers' Liability Law here involved. The Oregon court, however, did not pass on whether the Liability Law could be applied to a maritime tort, because of its view that the action was in any event barred by the federal Longshoremen's Act. Hence that issue was not ripe for decision by this Court and the Court properly remanded the case to the state courts for further proceedings without passing on it.[15]

D. A STATE WRONGFUL DEATH STATUTE MAY NOT BE APPLIED TO CREATE A CAUSE OF ACTION FOR A DEATH OCCURRING ON NAVIGABLE WATERS UNLESS THERE WAS ALSO A BREACH OF DUTY UNDER THE STANDARDS OF THE MARITIME LAW

It is established, of course, that state law may be applied in admiralty to provide a remedy for wrongful death. *E.g., The Hamilton,* 207 U.S. 398; *West-*

[15] Even if the case had held, as petitioner claims, that Hahn's suit for damages would be governed by state law rather than federal law, although for a maritime tort, it would not follow that state law could be applied in an action not specifically authorized as an alternative to compensation when the employer fails to insure under the compensation act. In the *Hahn* situation, allowance of the action under state law might be deemed a substitute for compensation or as a penalty against the employer for his failure to comply with the compensation act. See, *e.g.*, 37 Tex. L. Rev. 645, 647–648; 72 Harv. L. Rev. 1363, 1368; 33 Tul. L. Rev. 899, 902. That is, the state's power in those circumstances to enforce a tort action under strict state standards might be deemed to derive from its conceded power to provide for workmen's compensation, the tort action being an instrument for enforcing the compensation act. Such a holding would clearly not, however, support the application of state law to an action on a maritime tort brought against one other than the employer—particularly where, as here, the plaintiff had already received compensation.

ern Fuel Co. v. *Garcia,* 257 U.S. 233; cf. *Just* v. *Chambers,* 312 U.S. 383. In all of those cases, the substantive standards of tort liability applied were identical with those of the maritime law, and, since there was no maritime policy opposed to a wrongful death remedy, the state statutes were a permissible supplement to the maritime law.

Petitioner contends, however, that a state wrongful death statute may be applied in admiralty even though the basis for recovery is a standard of tort liability more strict than that of maritime law--i.e., even though there was no breach of duty under the maritime law in the sense that the decedent, had he lived, could have maintained an action on a maritime tort for his injuries. In particular, petitioner contends that even though the higher care standards of the Oregon Employers' Liability Law could not be applied in an action for injuries received on navigable waters, it can be applied if the injured person dies and the action is transformed into a wrongful death action.

Petitioner relies for that result on a statement in *The Tungus* v. *Skovgaard,* 358 U.S. 588, 592, that when "admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached." The meaning of that statement, however, becomes clear from the issue before the Court: namely, whether, assuming the state wrongful death statute did not by its own terms apply to deaths caused by unseaworthiness, the statute could nevertheless be applied in admiralty

to give a wrongful death remedy for unseaworthiness. The Court held that it could not be; that the remedy, being state-created, was available only when the state said it was; or, in short, that the state "conditions and limitations" on the state remedy must be respected. Obviously, there was no issue of the application of state standards of substantive tort liability, for the very basis of liability being asserted was the maritime law of unseaworthiness.

Quite contrary to petitioner's contention, the opinions in *Tungus*, read as a whole, make plain that recovery under a wrongful death statute would equally be barred if there were no basis for the tort liability under the substantive standards of the maritime law. In short, two conditions must be satisfied for recovery in a wrongful death action: (1) there must be a breach of a duty defined by the maritime law; and (2) the state remedy invoked must be applicable by its own terms.

III

SINCE THE OREGON EMPLOYERS' LIABILITY LAW COULD NOT BE INVOKED IN AN ACTION AGAINST A PRIVATE INDIVIDUAL IN LIKE CIRCUMSTANCES IT CANNOT BE INVOKED AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT

1. We have seen that, had this action been brought, under the law of Oregon, against a similarly-situated private defendant, the Oregon Employers' Liability Law could not have been invoked. The same result must be reached in this suit against the United States under the Federal Tort Claims Act for that Act pro-

vides that the Government's liability is to be governed by "the law of the place where the act or omission occurred * * * in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1346(b), 2674. This conclusion would seem to be obvious since all of the acts or omissions alleged, as well as the injury, occurred in Oregon.[16]

Petitioner contends, however, that the "place" where the alleged omission occurred was on land (*i.e.*, the dam itself, which petitioner contends is an extension of "land") and hence that the proper reference under the Tort Claims Act is to the law governing torts occurring on land rather than torts occurring on navigable waters. Petitioner's premise is that the Tort Claims Act's reference to "the law of the place where the act or omission occurred" is a reference to a particular state substantive rule applicable to the specific locality or type of terrain on which the act occurred. The weakness of the argument is that, patently, the Act's choice-of-laws provision is no more than a typical conflicts rule specifying the *jurisdiction* or "legal authority"[17] whose laws shall govern the action. It establishes what this Court has called a "territorial standard", choosing from among "the states or governments whose competing laws [might

[16] For Federal Tort Claims Act cases applying general maritime principles under this theory, see *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4); *Russell, Poling & Co.* v. *United States*, 140 F. Supp. 890, 892 (S.D. N.Y.); *State Road Department* v. *United States*, 78 F. Supp. 278, 280 (N.D. Fla.); *Moran* v. *United States*, 102 F. Supp. 275, 278–279 (D. Conn.).

[17] *Lauritzen* v. *Larsen*, 345 U.S. 571, 583; see also *Romero* v. *International Terminal Co.*, 358 U.S. 354, 384.

otherwise be] involved." *Lauritzen* v. *Larsen,* 345 U. S. 571, 582, 584. Since only political entities have laws, "the law of the place" can mean nothing else. And once the reference has been made to the appropriate state, the determination of the substantive rule applicable to the particular transaction is a question of state law, limited, as here, by the state's obligation to follow the maritime law.

Eastern Air Lines v. *Union Trust Co.,* 221 F. 2d 62 (C.A.D.C.), certiorari denied *sub nom. Union Trust Co.* v. *United States,* 359 U.S. 911, relied upon by petitioner, held only that the action was governed by the law of the place where the negligent acts occurred (Virginia) rather than that of the place of the injury (District of Columbia). That was a choice simply of the jurisdiction to whose laws reference should be made and in no way conflicts with the instant case, where all the relevant events occurred in Oregon and it is agreed by all that Oregon law is controlling.

2. If the petitioner's contention were correct, it would mean that Congress, in enacting the Tort Claims Act, did not simply waive the sovereign immunity from suit in tort by equating the Government's liability to that of a "private individual under like circumstances," but also substantively altered the accepted distinction between those torts which are governed by admiralty law and those which are not. Nowhere in the history of the Act, however, is there the slightest suggestion that Congress intended that the firmly established distinction between maritime torts subject to admiralty jurisprudence and land

torts governed by local law should be disregarded in suits against the United States. To the contrary, the committee reports clearly indicate that the sole purpose was "to waive a part of the governmental immunity to suit in tort." H. Rep. 1287, 79th Cong., 1st Sess., pp. 1–2.[18]

A similar attempt to read into a waiver of sovereign immunity a change in the general rules of admiralty jurisdiction was forcefully rejected in *Maine* v. *United States*, 45 F. Supp. 35 (D. Me.), affirmed, 134 F. 2d 574 (C.A. 1), certiorari denied, 319 U.S. 772. There it was contended that the Public Vessels Act had created jurisdiction in admiralty over an action for damages caused by a Government vessel's ramming of a bridge pier, although such an action between private parties would not have been within admiralty jurisdiction. In language equally applicable here, the district court said (45 F. Supp. at 37–38):

> It is quite clear from the background and history of the legislation in Congress that there was no intention by the act in question to give rights of action against public vessels in cases not previously cognizable in admiralty against private vessels, the purpose of the act

[18] See also S. Rep. 1400, 79th Cong., 2d Sess., pp. 29–30. As this Court stated in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68–69: "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws."

being only to remove the defense of soverign immunity.

It appears from extracts of reports of Committees of the Congress and from other statements made in the course of the passage of the legislation that it was intended by the act to give to private shipowners the same rights against the Government that they had against each other and to authorize actions against the United States of the type cognizable in admiralty between private parties. * * *

* * * * *

On the whole, it is * * * apparent that Congress in passing the act in question had no intention of enlarging admiralty jurisdiction to cover damage by vessels to land structures; nor of diminishing the rights of the Government except as to immunity to suit; * * *.

The Court of Appeals affirmed the "full, thorough and carefully reasoned opinion" of the district court that "'the purpose of the Act [was] only to remove the defense of sovereign immunity'". 134 F. 2d at 575, 576.

IV

THE OREGON EMPLOYERS' LIABILITY LAW IS BY ITS OWN TERMS INAPPLICABLE

Even if there were no constitutional prohibition against the application of the Oregon Employers' Liability Law in the circumstances of this case, petitioner's position would not be improved. By its terms, a[illegible]d as construed by the Oregon Supreme Court, the coverage of the act in no event would extend to the situation at bar.

1. The repair and construction work called for by the contract was entirely under the supervision, control and direction of Larson, the decedent's employer. Larson was not only under a duty to supply all necessary equipment and labor but, additionally, he had the sole voice with respect to "the details, manner, [and] method by which the work under the contract was to be accomplished" (R. 58). For its part the Government possessed the right merely to insure that the "general result [was] in conformity with the contract's specifications" (R. 58).

As thus contemplated by the contract, the United States at no time assumed an active role in either the formulation or the execution of the sounding operation which led to the death of petitioner's decedent. At the outset, it was Larson who decided that soundings should be taken; the contract specifications neither required nor referred to such a course of action in the project area (R. 54). Having made this decision, Larson then determined for himself both how the operation was to be conducted and that it involved no undue risk to the personnel involved (R. 54–55, 58). Specifically, Larson (1) determined that the soundings would be taken in Bay 9 off the side of a barge; (2) concluded that only the gates in Bays 9 and 10 need be closed for this purpose; and (3) dispatched his superintendent on a reconnaissance mission to insure that the operation, as planned, could be safely conducted (R. 54–55). Larson did not seek the Government's opinion as to the safety of the operation; rather, the construction project engineer's participation was limited to receiving, and forwarding

to the operating personnel of the dam, the Larson request that the gates in Bays 9 and 10 be closed (R. 54–55). That request was honored (R. 54).

Larson himself selected the tug and barge to be utilized in the operation (R. 55, 58). He also selected the captain and other members of the tug's crew, as well as the personnel comprising the sounding party (which was in charge of a civil engineer in Larson's employ) (R. 55, 58–59). And Larson, or his representative, directed the method by which the tug and barge were to be fastened together and formulated the route that the unit was to take in reaching the situs of the proposed soundings (R. 55–56, 58).

2. The keystone of the Oregon Employers' Liability Law is Ore. Rev. Stat. 654.305, *infra*, pp. 49–50, which provides in relevant part:

> Generally, all owners, contractors or subcontractors and other persons *having charge of, or responsible for, any work* involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb * * *. [Emphasis added.]

Ore. Rev. Stat. 654.310, *infra*, p. 50, dealing with the protective measures to be observed regarding dangerous machines, equipment and devices, begins with:

> All owners, contractors, subcontractors or persons whatsoever, *engaged* in the construction, repairing, alteration, removal or painting of any building * * *. [Emphasis added.]

On its face, then, the statute imposes a special duty only upon those who, unlike the Government here, are

actually *engaged* in the work which subjects the employees to danger, or are in charge of it.

In *Warner* v. *Synnes,* 114 Ore. 451, the defendant lumber company had retained the plaintiff's employer, Synnes, as an independent contractor to do repair, alteration and construction work on the lumber company's premises. As is true of the Government here (R. 58), the lumber company did not exercise control over the work of the independent contractor but, rather, was interested only in the result. The company did, however, furnish certain equipment to Synnes, including a rope which was used by the latter on a scaffold. Injured when the rope broke, the plaintiff brought suit against the lumber company under the Employers' Liability Law, alleging that the company (1) had failed to provide a safe place to work; (2) had allowed an unsuitable rope to be used in the construction of the scaffold; and (3) had failed to test the material which it had furnished to the contractor.

In reversing a jury verdict in favor of the plaintiff, the Oregon Supreme Court stated (114 Ore. at 458):

> It is well settled in this jurisdiction that where the work is in charge of a contractor and the party with whom he contracts is concerned only in the general result of the work and has no control of the details and manner in which the work shall be accomplished the contractor alone is responsible to the person in his employ who is injured during the progress of the work. * * * The reason for making the contractor alone responsible and exonerating the

> owner with whom he contracts is that the owner is not the person in charge of the work and so is not responsible for the injury complained of * * *.

The court added that (114 Ore. at 458):

> * * * The mere retention by the owner of the right to inspect work as it progressed for the purpose of determining whether it was completed according to plans and specifications does not operate to create the relation of master and servant between the owner and those engaged on such work * * *.

Cf. *Lawton* v. *Morgan, Fliedner & Boyce,* 66 Ore. 292; *Tamm* v. *Sauset,* 67 Ore. 292.

3. Notwithstanding *Warner* v. *Synnes, supra,* petitioner argues that it is totally irrelevant that the Government was not engaged in, in charge of, or responsible for the sounding expedition. His theory seemingly is that it is sufficient that employees of the United States operated the spillway dam and its gates.

A sufficient answer is that this line of argument totally ignores the fact that Larson's control over the manner in which the expedition was to be conducted extended to the matter of the number of dam gates that were to remain open while the soundings were taken (and, therefore, the amount of water which was being discharged). The determination that only the gates in Bays 9 and 10 would be closed was made by Larson on the basis of his superintendent's reconnaissance trip and his own knowledge (not shared by the Government) of the intimate details of the operation and the precise nature of the equipment which was to be utilized. And petitioner himself

places considerable emphasis on the evidence that, had Larson requested that an additional gate be closed, that request undoubtedly would have been honored.

Petitioner can point to no Oregon decision under the Liability Law in which an owner was held liable to an employee of an independent contractor in circumstances where the contractor possessed anything approaching Larson's degree of responsibility and control over every detail of the sounding operation and the conditions under which it was being carried out. Even a cursory examination of the cases upon which he relies will reflect their marked difference from the facts of this case.

In both *Rorvik* v. *Northern Pac. Lumber Co.*, 99 Ore. 58, and *Pacific States Lumber Co.* v. *Bargar*, 10 F. 2d 335 (C.A. 9), for example, the statute was held applicable because the plaintiff's employer and the defendant were actively engaged in a common pursuit and there was an intermingling of the two sets of employees. Cf. *Drefs* v. *Holman Transfer Co.*, 130 Ore. 452. And, in *Walters* v. *Dock Commission*, 126 Ore. 487, the accident occurred by reason of an affirmative act of the defendant in the course of its work (*i.e.*, the ejection of the railroad car). This act was done without even the knowledge of any individual engaged in the work being performed by the decedent. Further, decedent's employer was not an independent contractor of the defendant and, unlike Larson, possessed no control whatsoever over the manner in which the railroad equipment was handled. Again, the only affirmative action taken by Govern-

ment employees in the present case which in any way affected petitioner's decedent was the closing of those gates which the persons engaged in, responsible for, and in charge of, the sounding operation deemed necessary for the safety of decedent and the other personnel involved.

Certainly, the recent Oregon Supreme Court decision in *Byers* v. *Hardy*, 68 Ore. Adv. Sh. 557, 337 P. 2d 806, from which the petitioner quotes at length (Pet. Br. 32–33), does not bolster his argument. Not only did the state Supreme Court expressly decline to decide what degree of control by the defendant would have been necessary before the Liability Law could have been invoked in that case but held, on the facts there present, that the defendant's control was insufficient to bring the Law into application.

4. While it was not necessary for the courts below to reach the question, it is worthy of note that the record does not support petitioner's contention that there was a violation by the Government of the standard of care prescribed by the Employers' Liability Law. Petitioner asserts (Pet. Br. 40) that the law imposed a duty upon the United States either (1) to close additional gates, or (2) to warn Larson as to the alleged "dangerous condition created by the turbulent waters in the immediate vicinity of [Bay 9]". But, as the district court found, the "turbulent condition of the water in the spillway basin was open, apparent and obvious to all, including the independent contractor, the operator of the tugboat and the other employees of the independent contractor" (R. 57). The court additionally found that the "difference in

elevation of the water in the turbulent area opposite the open gates, as compared with the area opposite the closed gates in the spillway basin was also visible and obvious" (R. 57).

In view of these findings, coupled with the trip made by the Larson superintendent for the sole purpose of determining whether the soundings could be taken safely, no duty to warn (on the part of the Government) could possibly have arisen under the Law. Larson's information as to the turbulent nature of the waters, and the significance thereof in terms of the safe conduct of the sounding operation, was superior to that of the Government.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be affirmed.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
ALAN S. ROSENTHAL,
SETH H. DUBIN,
Attorneys.

SEPTEMBER 1959.

APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b).

> Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U.S.C. 2674.

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The Oregon Employers' Liability Law provides as follows (Ore. Rev. Stat.):

> 654.305 *Protection and safety of persons in hazardous employment generally.* Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible

for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

654.310 *Protective measures to be observed regarding certain machines, equipment and devices which are dangerous to employes.* All owners, contractors, subcontractors or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6) All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power.

(7) In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the employes of the owner, contractor or subcontractor transmitting or using the electricity are liable to come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

654.315 *Persons in charge of work to see that ORS 654.305 to 654.335 is complied with.* The owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

654.320 *[illegible] considered agent of owner.* The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employe.

654.325 *Who may prosecute damage action for death; damages unlimited.* If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or

subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs, and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named.

654.330 *Fellow servant's negligence as defense.* In all actions brought to recover from an employer for injuries suffered by an employe, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

(1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

(2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances.

(3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employe was engaged at the time of the injury or death.

(4) The incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

(5) The act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.